

LABOR CABINET
Department of Workplace Standards
(New Administrative Regulation)

803 KAR 1:071. Executive, administrative, supervisory or professional employees; salesmen.

RELATES TO: KRS 337.275, 337.285

STATUTORY AUTHORITY: KRS 337.010(2)(a)2, 337.295

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.010(2)(a)2 exempts any individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of outside salesman, or as an outside collector as the terms are defined by administrative regulations of the commissioner from both the minimum wage and overtime requirements set forth in KRS 337.275 and 337.285. This administrative regulation defines what constitutes an individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of an outside salesman or outside collector.

Section 1. Scope. (1) The exemptions set forth in KRS 337.010(2)(a) shall not apply to workers as established in 29 C.F.R. 541.3(a).

(2)(a) The exemptions set forth in KRS 337.010(2)(a) shall not apply to workers as established in 29 C.F.R. 541.3(b)(1).

(b) The exempted employees identified in subsection 2(a) of this section do not qualify as exempt employees for reasons established in 29 C.F.R. 541.3(b)(2) through 541.3(b)(4).

Section 2. Executive Employees. (1) The term "individual employed in a bona fide executive capacity" in KRS 337.010(2)(a)2 includes employees:

(a) Compensated on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and

(b) Who meet the criteria as established in 29 C.F.R. 541.100(a)(2) through 541.100(a)(4) and 541.101.

(2) "Management" shall include activities as established in 29 C.F.R. 541.102.

(3) The phrase "a customarily-recognized department or subdivision" is as established in 29 C.F.R. 541.103.

(4) To qualify as an exempt executive under KRS 337.010(2)(a)2, the criteria shall be as established in 29 C.F.R. 541.104.

(5) To determine whether an employee's suggestions and recommendations are given "particular weight" the factors shall be as established in 29 C.F.R. 541.105.

(6) The criteria for concurrent performance of exempt and nonexempt work shall be as established 20 C.F.R. 541.106.

Section 3. Administrative Employees. (1) The term "individual employed in a bona fide administrative capacity" in KRS 337.010(2)(a)2 shall include employees:

(a) Compensated on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and

(b) Who meet the criteria as established in 29 C.F.R. 541.200(a)(2) and 541.200(a)(3).

(2) To qualify for the administrative exemption in KRS 337.010(2)(a)2, the criteria shall be as established in 29 C.F.R. 541.201 through 541.204.

Section 4. Professional Employees. (1) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)(2) shall include employees:

(a) Compensated on a salary or fee basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and

(b) Who meet the criteria as established in 29 C.F.R. 541.300(a)(2).

(2) To qualify for the learned professional exemption, the criteria shall be as established in 29 C.F.R. 541.301.

(3) To qualify for the creative professional exemption, the criteria shall be as established in 29 C.F.R. 541.302.

(4) Teachers.

(a) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)(2) shall include any employee as established in 29 C.F.R. 541.303(a) through (c).

(b) The salary requirements of Section 8 of this administrative regulation shall not apply to the teaching professionals described in this subsection.

(5) Practice of law or medicine.

(a) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)(2) shall include any employee as established in 29 C.F.R. 541.304(a) through 541.304(c).

(b) The salary requirements of Section 8 of this administrative regulation shall not apply to the employees described in this subsection.

Section 5. Supervisors. The term "individual employed in a bona fide supervisory capacity" in KRS 337.010(2)(a)(2) includes employees:

(1) Who are compensated for his or her services on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and

(2) Who meet the criteria as established in 29 C.F.R. 541.104.

Section 6. Outside Sales Employees. (1) The term "individual employed in the capacity of outside salesman" in KRS 337.010(2)(a)(2) shall include employees:

(a) Whose primary duty is:

1. Making sales; or

2. Obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and

(b) Who is customarily and regularly engaged away from the employer's place or places of business in performing the employee's primary duty.

(2) In determining the primary duty of an outside sales employee, the criteria shall be as established in 29 C.F.R. 541.500(b).

(3) The salary requirements of Section 8 of this administrative regulation shall not apply to employees described in this section.

(4) Making sales or obtaining orders.

(a) The criteria for making sales within the meaning of this section shall include criteria as established 29 C.F.R. 541.501(b) and 541.501(d).

(b) Obtaining orders for the use of facilities includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(5) The criteria for an outside sales employee to be customarily and regularly engaged "away from the employer's place or places of business" shall be as established in 29 C.F.R. 541.502.

(6) The criteria for determining if promotional work is exempt under this section shall be as established in 29 C.F.R. 541.503.

(7) The criteria for drivers who sell to be exempt under this section shall be as established in 29 C.F.R. 541.504.

Section 7. Outside Collector. (1) The term "individual employed as an outside collector" in KRS 337.010(20)(a)2 shall include any employee who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business and whose primary duty is:

(a) Collecting money for goods or services previously or presently furnished by his employer; or

(b) Collecting money for an account placed in the hands of his employer for collection.

(2) In determining the primary duty of an outside collector, work performed incidental to and in conjunction with the employee's outside collection activities shall be exempt work.

(3) The salary requirements of Section 8 of this administrative regulation shall not apply to the outside collector employees described in this section.

Section 8. Salary Requirements. (1) To qualify as an exempt executive, administrative, professional, or supervisory employee under KRS 337.010(2)(a)2, an employee shall be compensated on a salary basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities. Administrative and professional employees may also be paid on a fee basis as defined in Section 12 of this administrative regulation.

(2) The \$684 per week may be translated into equivalent amounts for periods longer than one (1) week. The requirement shall be met if the employee is compensated biweekly on a salary basis of \$1,368, semimonthly on a salary basis of \$1,482, or monthly on a salary basis of \$2,964. Except, the shortest period of payment that meets this compensation requirement is one (1) week.

(3) For academic administrative employees, the compensation requirement may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in Section 3(4) of this administrative regulation.

(4) For computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than twenty-seven (27) dollars and sixty-three (63) cents an hour, as provided in Section 14 of this administrative regulation.

(5) The exception from the salary or fee requirement shall not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

Section 9. Highly-Compensated Employees. (1) An employee with total annual compensation of at least \$107,432 shall be exempt under KRS 337.010(2)(a)2 if the employee customarily and regularly performs any one (1) or more of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in this administrative regulation. Where the annual period covers periods both prior to and after the date this administrative regulation is effected, the amount of total annual compensation due will be determined on a proportional basis.

(2)(a) "Total annual compensation" shall include at least \$684 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned during a fifty-two (52) week period.

(b) "Total annual compensation" shall not include board, lodging, or other facilities as defined in Section 13 of this administrative regulation, and shall not include payments for medical insurance, payments for life insurance, contributions to retirement plans, and the cost of other fringe benefits.

(c) If an employee's total annual compensation does not total at least the minimum amount established in subsection (1) of this section by the last pay period of the fifty-two (52) week period, the employer may, during the last pay period or within one (1) month after the end of the fifty-two (52) week period, make one (1) final payment sufficient to achieve the required level.

(d) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a pro rata portion of the minimum amount established in subsection (1) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one (1) final payment as under paragraph (b) of this subsection within one (1) month after the end of employment.

(e) The employer may use any fifty-two (52) week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year shall apply.

(3) A highly compensated employee shall qualify for exemption if the employee customarily and regularly performs any one (1) or more of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in this administrative regulation.

(4) This section shall not apply to employees whose primary duty includes performing nonoffice or manual work.

Section 10. Salary Basis. (1)(a) The criteria for an employee to be considered paid "on a salary basis" within the meaning of this administrative regulation shall be as established by 29 C.F.R. 541.602(a)(1) through 541.602(a)(2).

(b) Up to ten (10) percent of the salary amount required in Section 10(1)(a) of this administrative regulation may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently.

1. The employer may utilize any fifty-two (52) week period as the year, such as a calendar year, fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year shall apply.

2. This provision shall not apply to highly compensated employees.

3. If by the last pay period of the fifty-two (52) week period the sum of the employee's weekly salary plus nondiscretionary bonus, incentive and commission payments received is less than fifty-two (52) times the weekly salary amount required, the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the year. Any final payment made after the end of the fifty-two (52) week period shall count only toward the prior year's salary amount.

4. An employee who does not work a full fifty-two (52) week period for the employer, either because the employee is newly hired after the beginning of this period or ends the employment before the end of this period, may qualify for exemption if the employee receives a pro rata portion of the minimum amount established, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment under subsection (1)(b)3 of this section within one pay period after the end of employment.

(2)(a) The exceptions to the prohibition against deductions from pay in the salary basis requirement shall be as established in 29 C.F.R. 541.602(b)(1) and 541.602(b)(3) through 541.602(c).

(b) Deductions from pay in the salary basis requirement may be made for absences of one (1) or more full days occasioned by sickness or disability, if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability.

1. If the employer's particular plan, policy or practice provides compensation for the absences, deductions for absences of one (1) or more full days because of sickness or disability may be made before an employee has qualified under the plan, policy, or practice, and after the employee has exhausted his or her leave allowance thereunder. It is not required that the employee be paid any portion of his or her salary for the day or days for which the employee receives compensation for leave under the plan, policy or practice.

2. If the employer operates under a state sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of one (1) or more full days if benefits are provided in accordance with the particular law or plan.

3. For an industrial accident, the "salary basis" requirement shall be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer; if, the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(3) The effect of improper deductions from salary are as established in 29 C.F.R. 541.603.

Section 11. The criteria for the minimum guarantee plus extras are as established in 29 C.F.R. 604.

Section 12. The criteria for when administrative and professional employees may be paid on a fee basis, rather than on a salary basis are as established in 29 C.F.R. 541.605.

Section 13. Board, Lodging, or Other Facilities. (1) The phrase "exclusive of board, lodging, or other facilities" shall mean "free and clear" or independent of any claimed credit for noncash items of value that an employer may provide to an employee. Costs incurred by an employer to provide an employee with board, lodging, or other facilities shall not count towards the minimum salary amount required for exemption under this administrative regulation. Separate transactions are not prohibited between employers and their employees, but the costs to employers associated with the transactions shall not be considered in determining if an employee has received the full required minimum salary payment.

(2) "Other facilities" refers to items similar to board and lodging, such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished for dwelling purposes; and transportation furnished to employees for ordinary commuting between their homes and work.

Section 14. Computer Employees. (1) Computer system analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field shall be eligible for an exemption as professionals under KRS 337.010(2)(a)2. Job titles shall not be determinative of the applicability of this exemption.

(2) The exemption for computer employees shall apply to any computer employee as established in 29 C.F.R. 541.400(b) and 541.402.

(3) The exemption for computer employees shall not include employees established in 29 C.F.R. 541.401.

Section 15. Miscellaneous Provisions. (1) The criteria for primary duty are as established in 29 C.F.R. 541.700.

(2) The phrase "customarily and regularly" is as established in 29 C.F.R. 541.701.

(3) Directly and closely related shall be as established in 29 C.F.R. 541.703

(4) The criteria for determining whether the use of manuals precludes an exemption under KRS 337.010(2)(a)2 is as established in 29 C.F.R. 541.704.

(5) The criteria for the prohibition of KRS 337.010(2)(a)2 exemption to trainees is as established in 29 C.F.R. 541.705.

(6) The criteria for the application of emergencies to exempt employees shall be as established in 29 C.F.R. 541.706.

(7) The criteria for determining whether occasional tasks precludes exemption under KRS 337.010(2)(a)2 are as established in 29 C.F.R. 541.707.

(8) The criteria for the exemption of employees performing a combination of exempt duties as set forth in this regulation are as established in 29 C.F.R. 541.708.

(9) The requirement that the employee be paid on a salary basis shall not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least \$1,043 a week (exclusive of board, lodging, or other facilities).

(a) An employee in this industry who is otherwise exempt under Sections 2, 3, or 4 of this administrative regulation, and who is employed at a base rate of at least \$1,043 a week is exempt if paid a proportionate amount, based on a week of not more than six (6) days, for any week in which the employee does not work a full workweek for any reason.

(b) An otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

1. The employee is in a job category for which a weekly base rate is not provided, and the daily base rate would yield at least \$1,043 if six (6) days were worked; or

2. The employee is in a job category having a weekly base rate of at least \$1,043, and the daily base rate is at least one-sixth (1/6) of such weekly base rate.

(10) Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of Section 10 of this administrative regulation shall not be disqualified from exemption under Sections 2, 3, 4, 5, or 14 of this administrative regulation on the basis that the employee is paid according to a pay system established by statute, ordinance, or administrative regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or the employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one (1) work-day if accrued leave is not used by an employee because:

1. Permission for its use has not been sought or has been sought and denied;

2. Accrued leave has been exhausted; or

3. The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

KIMBERLEE C. PERRY, Commissioner

JAMIE LINK, Secretary

APPROVED BY AGENCY: January 3, 2022

FILED WITH LRC: January 10, 2022

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on March 28, 2022 at 1:00pm (ET). This hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph 8(b) (R.S. 2020) and the continuing state of emergency due to the novel coronavirus pandemic. Public access to the meeting will be available at <https://us06web.zoom.us/j/88108844438>, or by telephone at (713) 353-0212 or 888-822-7517 (toll free), conference code 786462. Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through March 31, 2022. Send notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Duane Hammons, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, phone (502) 564-1507, fax (502) 564-5484, email Kenneth.hammons@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Duane Hammons

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation defines criteria for qualifying as an individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of an outside salesman or collector, all of which are exempt from overtime and minimum wage requirements.

(b) The necessity of this administrative regulation: KRS 337.010(2)(a)(2) and 337.295 require the commissioner to define criteria for those exempted from overtime and minimum wage and overtime in the statute.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 337.295 authorizes the commissioner to promulgate administrative regulations under KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405. KRS 337.010(2)(a)(2) requires the commissioner to define what constitutes an individual employed in a bona fide executive, administrative, supervisory, or professional capacity, or in the capacity of an outside salesman or collector. This administrative regulation defines those terms.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation is necessary to define and provide guidance on the exemptions to KRS 337.275 and 337.285. It helps employers and employees in understanding their obligations and rights under the law.

(2) If this is an amendment to an existing regulation, provide a brief summary of:

(a) How this amendment will change this existing administrative regulation:

(b) The necessity of the amendment to this administrative regulation:

(c) How the amendment conforms to the content of the authorizing statutes:

(d) How the amendment will assist in the effective administration of the statutes

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation affects all subject employers who employ employees in the Commonwealth subject to KRS Chapter 337, as well as their employees.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional compliance duties are required by this administrative regulation as it is replacing 803 KAR 1:070.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no additional cost associated with this administrative regulation as it is replacing 803 KAR 1:070.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee protection and guidance for employers on when employees are exempt from KRS 337.275 and 337.285.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:070.

(b) On a continuing basis: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:070.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change if it is an amendment: This administrative regulation is not anticipated to generate any increase in fees or funding as it is replacing 803 KAR 1:070.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: There are no fees associated with this administrative regulation.

(9) TIERING: Is tiering applied? Tiering is not applied. All employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Most state and local governmental entities are subject to KRS Chapter 337.

(2) Identify each state or federal statute or regulation that requires or authorizes the action taken by the administrative regulation. KRS 337.295 and 337.010(2)(a)2.

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will not generate revenue.

(b) How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will not generate revenue.

(c) How much will it cost to administer this program for the first year? There is no cost to this administrative regulation as it is replacing 803 KAR 1:070.

(d) How much will it cost to administer this program for subsequent years? There is no cost to this administrative regulation as it is replacing 803 KAR 1:070.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown

Expenditures (+/-): Unknown

Other Explanation: This administrative regulation does not impose any additional requirements as it is replacing 803 KAR 1:070.